

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

| | | |
|---------------------------------------|---|----------------|
| NANG THACH |) | |
| Claimant |) | |
| V. |) | |
| |) | CS-00-0114-044 |
| FARMLAND FOODS, INC. |) | AP-00-0444-032 |
| Respondent |) | |
| AND |) | |
| |) | |
| SAFETY NATIONAL CASUALTY CORP. |) | |
| Insurance Carrier |) | |

ORDER

Respondent requested review of the June 28, 2019, Award by Administrative Law Judge (ALJ) Ali N. Marchant. The Board heard oral argument on November 14, 2019.

APPEARANCES

Roger A. Riedmiller, of Wichita, Kansas, appeared for Claimant. Thomas J. Walsh, of Kansas City, Kansas, appeared for Respondent and its insurance carrier. Due to the retirement of Board Member Gary R. Terrill, Joseph Seiwert was appointed as a Board Member Pro Tem in this case.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent appeals, arguing Claimant failed to meet his burden of proving his injury arose out of his employment. Specifically, Claimant does not fall under the personal comfort doctrine because Claimant's act of moving his motorcycle does not involve ministering to a personal comfort such as eating, drinking, or using the restroom, and the activity itself, does not fall within the underlying theory of the personal comfort doctrine because it does not benefit both the employer and employee. Therefore, pursuant to Kansas law, workers compensation benefits should be denied.

Claimant argues the ALJ's Award should be affirmed.

The issues on appeal are:

1. Whether Claimant's accident arose out of and in the course of his employment specifically: whether there is a causal connection between the conditions under which the work is required to be performed and the resulting accident; whether Claimant's accidental injury was due to a neutral risk with no particular employment or personal character; whether Claimant's accidental injury arose out of a risk personal to the worker; and whether Claimant's accidental injury was due to either directly or indirectly from idiopathic causes?

2. What is nature and extent of Claimant's permanent impairment?

3. Is Claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant was employed by Respondent as a maintenance mechanic.

On January 29, 2015, Claimant arrived at work and initially parked his motorcycle in a handicapped spot in the supervisor's parking lot because there were no parking spots left in the motorcycle parking lot. Claimant worked on third shift. Second shift employees do not get off work until thirty minutes after third shift employees were required to report to work. Such an arrangement made it difficult, at times, for third shift employees to find an appropriate parking spot. It was not uncommon for third shift employees to move their vehicle to get a more convenient parking spot on their break after the second shift employees had gone home.

There was extensive testimony about the Respondent's parking policies. According to Manuel Diaz, Director of Human Resources, the employer has a written policy requiring employees to follow employer's rules regarding where employees park. Respondent's practice is ticket those cars parked in violation of the employer's policies. The ticket would be left on the windshield of the offending vehicle and a copy is given to the employer. Vehicles can be towed at the owner's expense if they are parked in an area where they should not be parked. However, no one could verify the towing policy has been used. Mr. Diaz acknowledged, an employee may be subject to discipline for violation of the parking policies. Mr. Diaz observed that if an employee is violating company policies, including parking policies, the employee is expected to stop and take corrective action. Claimant possibly could have received a ticket for parking his motorcycle in a handicapped spot in the supervisors parking lot. However, the potential discipline might be a warning for the ticket if he had received one.

As a maintenance employee, Claimant was given a radio. Maintenance employees are required to wear the radio at all times, during breaks, and have it turned on when they are on Respondent's premises and on the clock. The purpose of the radios is to ensure that all maintenance employees can be reached if they are needed in another area for maintenance. If they are called on the radio while on break, they are required to respond to the call and may resume their break later or reschedule it.

There is extensive testimony about Respondent's policies governing employee breaks. The consensus of the employer witnesses is that employees, including Claimant, get a fifteen minute paid break before lunch. During their break, all employees are allowed to leave Respondent's premises or do anything they want, including moving a vehicle in the parking lot, as long as the employee does not violate company policy.

While on break, Claimant and another employee, Ryaan Mitchell, went out to the employee parking lot to look at Claimant's motorcycle. Claimant also wanted to move his motorcycle. Claimant then got on his motorcycle wearing his work safety helmet. Mr. Mitchell saw Claimant drive slowly away on his motorcycle. When Claimant was about five to six parking stalls from Mr. Mitchell, Claimant's motorcycle began to sway back and forth and fell to the ground. According to the employer witnesses, no one told Claimant to move his motorcycle during his break.

As a result of the January 29, 2015, accident, Claimant sustained a severe traumatic brain injury. Claimant underwent extensive medical treatment including being hospitalized for two to three months. Claimant was then at a rehabilitation facility for one and one-half months. Claimant currently lives with his sister, who is his legal guardian, and their parents. Claimant has difficulty speaking, short-term memory problems and weakness on his right side. Claimant is unable to care for himself as a result of his injuries.

On November 12, 2015, Claimant met with George Fluter, M.D., for an Independent Medical Examination (IME), at the request of his attorney. Dr. Fluter recommended a comprehensive outpatient rehabilitation evaluation, including physical therapy, occupational therapy, and speech/cognitive therapy, as well as repeat neuropsychological testing. Dr. Fluter commented that Claimant would need to be followed by an appropriate interdisciplinary treatment team with a case manager experienced in assisting an individual with a severe traumatic brain injury. Dr. Fluter also opined that Claimant would not be expected to return to gainful employment in the foreseeable future.

Claimant met with Dr. Fluter for a second IME at the request of Claimant's counsel on October 19, 2017. Dr. Fluter found Claimant was "1. Status post severe traumatic brain injury; 01/29/15; 2. Status post partial calvarial removal; 3. Tracheostomy placement; subsequently removed; 4. PEG tube placement; subsequently removed." Dr. Fluter assigned Claimant a permanent impairment rating of 50 percent impairment to the body as a whole according to the *American Medical Guides to the Evaluation of Permanent Impairment, 6th Edition*, specifically "Class 3 alteration in MSCHIF (mental status,

cognition, and highest integrative function).” Dr. Fluter stated the following with regard to Claimant’s work capacity:

Mr. Thach has multiple impairments resulting from the traumatic brain injury and its sequelae. His ability to perform basic and advanced activities of daily living has been adversely impacted by these impairments. The impairments are permanent; therefore, a significant change in his ability to perform daily activities is not expected.

Under the circumstances of this particular case, it is my opinion that Mr. Thach’s impairments are such that he does not have the capacity to perform work activities on a regular and consistent basis.

In my opinion, Mr. Thach is totally and permanently disabled.¹

On January 31, 2017, Trevor Patton, Ph.D., performed a court-ordered independent neuropsychological evaluation. Dr. Patton performed several different tests, and his diagnosis was, “Major Neurocognitive Disorder due to TBI, with behavioral disturbance”. Dr. Patton’s report states, in pertinent part:

In summary, the current examiner’s opinion is that the current examination results consistently and conclusively indicate the presence of severe to profound neurocognitive, personality, and behavioral changes that are directly the result of the traumatic brain injury that was sustained at Farmland Foods in February of 2015. To which this examiner has alluded before, it is repeatedly documented that the vast majority of all traumatic brain injury patients complete their recovery from their injuries after about 24 months. Thus, it is very likely that Mr. Thach has completed his recovery, and the current findings reflect his permanent level of functioning.

...

In conclusion, Mr. Thach’s severe to profound cognitive impairments are classic for extreme traumatic brain injury (along with the more protracted and negative effects that occurred in the hours to days following the initial injury). Premorbidly, he was a very high-functioning young man with a keen intellect and special talent in mathematics. He has a well-documented history of excellence in school, the ability to live independently, and ability to function for an extended period in a highly skilled employment position. At no time during the current evaluation did the examiner note any subtle or overt signs of malingering. To be frank, it is the examiner’s distinct impression that Mr. Thach is quite simply unable to engage in effective malingering; he does not possess the requisite sophistication in order to do so. Even when compared to other TBI patients, Mr. Thach’s injuries are unusually severe and long-lasting. In this examiner’s opinion, any consideration that he might be able to

¹ Dr. Fluter Report dated Oct. 19, 2017, at 10-11.

maintain any kind of employment is completely unreasonable, in this examiner's opinion. He is unquestionably and completely disabled. In fact, he will never function independently, without a guardian, without supervision, and without a high level of daily structure and consistency.²

A summary of the Board's previous orders in this case are as follows.

First, the ALJ ruled in a preliminary hearing Order dated December 21, 2015, that Claimant's accidental injuries arose out of and in the course of Claimant's employment. Specifically, the ALJ ruled that although it is not completely clear as to what caused Claimant's accident, there is sufficient evidence to establish Claimant was moving his motorcycle to a different spot in Respondent's parking lot and was planning on returning to work after his break. The Claimant's break and his activities during the break, including moving his motorcycle, were incidents of Claimant's employment. Claimant was awarded temporary total benefits and authorized medical treatment. That decision was appealed to this Board, and the ALJ's ruling that Claimant's accidental injury arose out of Claimant's employment was reversed by a single Board Member who concluded Claimant was injured when performing a personal or neutral errand.

The ALJ entered a second preliminary hearing Order on August 19, 2016. New evidence was presented and the ALJ held that although Claimant's activities occurred during his break and fell within the personal comfort doctrine, Claimant did not show a nexus between his accidental injury and risks associated with his employment. A single Board Member affirmed the ALJ's Order because Claimant moving his motorcycle to non-handicapped spot during his break was a neutral or personal risk and did not arise out of Claimant's employment.

In her Award, the ALJ found Claimant permanently and totally disabled after suffering an injury arising out of and in the course of his employment with Respondent. The ALJ found that Claimant's short break and his activities during it, including moving his motorcycle to a different parking spot, fell within the personal comfort doctrine and were incidents of his employment. The ALJ also found Claimant entitled to temporary total disability benefits from January 29, 2015, through January 29, 2017. The ALJ found Claimant entitled to payment of his medical expenses related to his work accident. Respondent was ordered to pay as authorized all medical bills related to Claimant's January 29, 2015, work-related injury pursuant to the Kansas Workers Compensation Fee Schedule. Respondent was further ordered to reimburse to Claimant's counsel \$487.50 for the November 22, 2015, examination by Dr. George Flutter as unauthorized medical treatment. Finally, the ALJ found Claimant met his burden to prove that it is more probable than not that he will require future medical treatment.

² Dr. Patton Report dated January 31, 2017, at 10-11.

PRINCIPLES OF LAW AND ANALYSIS

The ALJ's conclusions of law and analysis of the nature and extent of Claimant's impairment, why Claimant's accidental injuries arose out of his employment with Respondent and Claimant's entitlement to future medical benefits are well-reasoned and detailed and adopted in their entirety by the Board.

There is an additional observation to be made about the connection between Claimant's employment and Claimant's accidental injury. From all the circumstances presented it is concluded Claimant more than likely would not have been moving his motorcycle on his break, but for the Respondent's parking policies. Claimant's accidental injury was prompted by his attempt to comply with the Respondent's parking policies, and therefore is connected to Claimant's employment with Respondent.

Respondent also argues that Claimant's act of moving his motorcycle while on his break does not fall within the personal comfort doctrine because it does not benefit the employer. It is acknowledged that Claimant was not parked in an appropriate spot. However, Claimant attempted to correct his mistake the first opportunity he had to do so, which occurred on break. It is to the employer's benefit that all employees follow the rules and policies. By moving his motorcycle to an appropriate parking spot, Claimant would have been in compliance with policies, as well as alleviating his concern about receiving a ticket. Such circumstances meet the criteria of the personal comfort doctrine.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board concludes the Award of the ALJ should be affirmed. Claimant has sustained his burden of proving he was injured by an accident arising out of and in the course of his employment. Claimant is permanently and totally disabled and entitled to future medical treatment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Ali N. Marchant dated June 28, 2019, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2020.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Roger A. Riedmiller, Attorney for Claimant
Thomas J. Walsh, Attorney for Respondent and its Insurance Carrier
Ali N. Marchant, Administrative Law Judge